88-1004

Supreme Court, U.S.
FILED
DEC 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

NO. _____

IN THE MATTER OF: CAMBRIDGE PROPERTIES, INC.

Debtor

CAMBRIDGE PROPERTIES, INC.,

Petitioner

=versus=

BATON ROUGE PRODUCTION CREDIT ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Appeal From The United States Court
Of Appeal, Fifth Circuit, No. 88-3133
And From The United States District Court
For The Eastern District Of Louisiana
(CA-87-4154-E (4)

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Properties, Inc., Petitioner

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE FIFTH CIRCUIT OPINION IS DIRECTLY CONTRARY TO EXPRESS PROVISIONS OF THE BANKRUPTCY ACT AS INTERPRETED BY THE SUPREME COURT IN THE TIMBER'S CASE AND IN CONFLICT WITH THE NINTH CIRCUIT OPINION IN THE MATTER OF IN RE: CIMARRON INVESTORS, No. 87-2135 (9th Cir. June 3, 1988), IN HOLDING THAT AN OVER-SECURED MORTGAGE CREDITOR IS ENTITLED TO POST-PETITION PAYMENTS OF PRINCIPAL AND INTEREST AS ADEQUATE PROTECTION

II.

WHETHER THE BANKRUPTCTY COURT ERRED IN LIFTING STAY IN THIS MATTER WHILE THE DEBTOR WAS IN THE PROCESS OF RESOLVING ITS DEBT STRUCTURE AND WHETHER MORE TIME SHOULD HAVE BEEN GRANTED FOR SUCH PURPOSE, UNDER CIRCUMSTANCES WHERE THE DEBT STRUCTURE WAS RESOLVED SHORLY AFTER THE STAY WAS LIFTED.

LIST OF PARTIES

The following are parties to these proceedings:

Cambridge Properties, Inc.

Baton Rouge Production Credit Association

Whitney National Bank

Geoffrey H. Longenecker

Sara Fish Longenecker

Anita Fish

Herbert E. Longenecker

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The opinions of the lower courts are not reported. The opinion of the Bankruptcy Court in Case No. 85-02098 "K", the opinion of the United States District Court, Eastern District of Louisiana in No. 87-4154-E (4), and of the United States Court of Appeal, Fifth Circuit, in No. 88-3133 are all set forth in the Appendix.

TABLE OF CONTENTS

Questions Presented For Review 1

List of Parties 2

Reference To Official And Unofficial Reports 2

Table of Contents 3

Table of Authorities 4

Statement of Jurisdiction 7

Statutes Which The Case Involves . . . 8

Statement Of The Case 12

Argument 23

Conclusion 34

Certificate of Service 35

TABLE OF AUTHORITIES

Questions Presented For Review 1

United Sav. Ass'n v. Timbers of Inwood Forest, 108 S. Ct. 626 (1988) 1

In re Cimarron Investors, Slip Opinion 87-2135 (9th Cir. June 7, 1988) 1

List of Parties 2

Reference To Official And Unofficial Reports 2

Table of Contents 3

Table of Authorities 4

Statement of Jurisdiction 7

United Sav. Ass'n v. Timbers of Inwood Forest, 108 S. Ct. 626 (1988) 7

Statutes Which The Case Involves . . . 8

Bankruptcy Act, Section 505 10

11 U.S.C. Section 362 8

Statement Of The Case 12

United Sav. Ass'n v. Timbers of Inwood Forest, 108 S. Ct. 626 (1988) 22

Argument 23

United Sav. Ass'n v. Timbers of Inwood Forest, 108 S. Ct. 626 (1988) 23-27

Chevron Oil v. Huson, 404 U.S. 97 (1971) 30

In re Timbers of Inwood Forest, 808 F.2d 363 (5th Cir. 1987) . 31

In re Cimarron Investors, Slip Opinion 87-2135 (9th Cir. June 7, 1988) . . 23, 24, 3

Bankruptcy Act, Section 506 . . 25

11 U.S.C. Section 502 28

11 U.S.C. Section 362 29

Conclusion 34

Certificate of Service 35

STATEMENT OF JURISDICTION

This petition for writ of certiorari seeks to review an opinion of the United States Court of Appeal, Fifth Circuit, Case No. 88-3133, decided by the original panel on September 28, 1988, and concerning which a petition for rehearing and rehearing en banc was filed and denied on November 1, 1988. The Honorable Court has jurisdiction over the matter which is on appeal from prior orders of the United States Bankruptcy Court, Eastern District of Louisiana in matter number 85-02098 "K" dated July 31, 1987 and from the United States District Court, Eastern District of Louisiana, in matter number 87-4154-E (4), dated February 17, 1988. See United Sav. Ass'n v. Timbers of Inwood Forest, 108 S. Ct. 626 (1988).

STATUTES WHICH THE CASE INVOLVES: -

Bankruptcy Act, Section 362,
11 U.S.C. Section 362:

> (a) Except as provided in subsection (b) of this section, a petitionn filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of__
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the

case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

* * * "

Bankruptcy Act, Section 505
11 U.S.C. Section 505:

> "(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such claim . . . .
>
> "(b) To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of

such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose."

STATEMENT OF THE CASE

This matter arises out of Chapter 11 proceedings pending in the Eastern District of Louisiana. The Bankruptcy Judge ordered the debtor, Cambridge Properties, Inc. ("Cambridge") to make monthly "adequate protection" payments to the first mortgage holder, Production Credit Association of Baton Rouge ("PCA") and on its alleged default in doing so lifted the automatic stay permitting foreclosure on the only asset of the debtor. Dismissal of the proceedings or conversion to Chapter 7 was neither sought nor ordered in the Bankruptcy Court. The order of the Bankruptcy Judge lifting the stay was appealed to the District Court, which affirmed, and then to the Fifth Circuit. The Fifth Circuit panel affirmed the lifting of the stay stating that it

agreed with the district court's conclusion that the "[o]rder [lifting the stay] was reasonable in lieu of the mortgages and encumbrances on the subject property, the length of time which [Cambridge] had been in Chapter 11, and [Cabridge's] failure to comply with the adequate protection agreements which resulted from prior Bankruptcy Court hearings." [Panel Opinion, p. 7.] Rehearing and rehearing en banc were denied on November 1, 1988, and Cambridge Properties, Inc. has petitioned this Honorable Court for a writ of certiorari and review.

The sole asset of the debtor is a sixty acre operating horse farm situated in St. Tammany Parish, Louisiana. At the time of the filing of the petition herein, the mortgage debt structure of the debtor was as follows:

First - PCA	$390,000.00
Second - Whitney Bank	50,000.00
Third - Central Savings	900,000.00
Fourth - Central Savings	900,000.00

The fair market value of the property subject to those mortgages was approximately $1,250,000.00 to $2,200,000.00. The Central Savings & Loan Association mortgages consisted of those peculiar Louisiana security devices known as "collateral mortgages" and were given to secure debt totally unrelated to the debtor or the property subject of these proceedings. The issue of any liability of the debtor under those collateral mortgages depended solely on the outcome of then pending and severely contested litigation in Louisiana state courts involving something on the order of forty parties at interest. During the course of this Chapter 11 proceeding, that litigation was settlement resulting in the

release and cancellation of the Central mortgages completely on September 17, 1987, shortly after the Bankruptcy Judge lifted the stay in this matter.

From the outset, the Central situation clearly impacted the debt structure of the debtor because in the event that the debtor was able to clear the mortgages, which is what actually transpired, then there was massive equity in the property. Being the sole asset of the debtor the property was clearly necessary to reorganization. Alternatively, if those mortgages could not be cleared, reorganization would have been most difficult. All parties recognized and admitted these facts in the numerous conferences with the Bankruptcy Judge, who was kept advised of the settlement progress and the settlement agreement

(actually approved by the Bankruptcy Court in other proceedings then pending in the district), and of the implementation of the same (which required numerous actions by the parties, including a time consuming foreclosure of totally unrelated property, execution of numerous releases, execution and recording of numerous motions to dismiss the numerous litigations involved in the settlement directly or indirectly, and so on). In early 1988, the settlement was completed with the exception of a mere recording of the Central notes marked cancelled. The final implementation of this massive settlement was actually occuring when the Bankruptcy Court acted ex parte without a hearing on PCA's motion to lift the stay in this matter which is the order subject of this appeal. As a matter of fact, the settlement agreement

was in fact totally completed by the debtor in this matter and the final conclusion of the agreement was a mere technicality -- namely, recordation of the cancelled mortgage notes affecting the property of the debtor in this matter.

Central, however, had misplaced the actual notes involved! Under Louisiana law, physical recordation of the notes effects a cancellation of the mortgage. The alternative, in the event the notes could not be found, would have been a further court proceeding with an expensive bonding requirement, which Central offered to accomplish in the event the notes did not turn up. They were finally located, however, and cancelled on September 17, 1987, which is a matter of record in these proceedings and were cancelled completely on September 17,

1988. (Appendix, pages 49 and 50.) Thus, while as a matter of reality, the debtor had all along had the equity it claimed in the property and the proof on the public record was accomplished on September 17, 1988.

Nevertheless, against this background of obvious good faith effort on the part of the debtor to resolve indebtedness bearing against its property, which effots were in fact successful, the Bankruptcy Judge, on the persistent motions of Production Credit, entered an order compelling the debtor, among other things, to make monthly cash payments to PCA in an amount more than interest on the note alone. The debtor acknowledges that it was present at conferences concerning this issue, but, with utmost due respect points out that the orders of the bankruptcy

judge order these payments came only after that judge stated that unless some monies were paid that he would lift the stay. They were not consent or agreed orders at all, as represented to this Honorable Court. The debtor refused to sign any such orders. But the debtor did its best to comply with them and believes that it in fact complied with those orders which it considered erroneously entered then and now. It was then, and is now, the position of the debtor that PCA is obviously over-secured as to its mortgage and that absent the collateral mortgages to Central, concerning which the debtor denied any liability, the debtor would have substantial equity in the property, a fact which was admitted by PCA at every hearing on the issue. The debtor's position in the property is now clearly

proven by the record in this matter. It is the debtor's position that it is not obligated to provide adequate protection to this over-secured creditor beyond its own over-security in the property.

It was the further position of the debtor that the PCA loan itself was not even delinquent in any event and that in fact the loan was at all times current, whether or not any monies were paid to PCA during the course of the Chapter 11 proceedings. The record indicates, and the panel correctly found, that there was a $500,000.00 mortgage on the property. However, the facts are that PCA never fully funded the $500,000.00 it had committed to fund and for which it had a mortgage, but merely funded $390,000.00 of its agreed committment. The difference is more than the total amount of money

involved alone. PCA's failure to fund its commitment and mortgage in fact caused the problems of the debtor to begin with.

There is no proof as to what payments the debtor made in the record beyond unsworn statements of counsel. The bankruptcy judge found that the debtor made payments to the creditor on September 26, 1986 and that thereafter, after yet another conference, on May 20, 1987 and June 20, 1987. On May 20, 1987, after the debtor had filed a plan and moved to have it confirmed, the bankruptcy judge ordered that if such payments ceased that he would automatically lift the stay without hearing. Subsequently, and there is no evidence in the record, the bankruptcy judge found that the debtor defaulted and lifted the stay on July 31, 1987. Confirmation hearings were not set on the

debtor's motion. Shortly thereafter the Central notes were found and the mortgages cancelled in the public records.

The debtor believes that the Fifth Circuit's opinion in this matter is erroneous and has petitioned this Court for review suggested that in light of recent decisions of the Supreme Court and the Ninth Circuit, that the Fifth Circuit's opinion is erroneous in that it clearly conflicts with the Supreme Court's opinion in Timbers and that of the Ninth Circuit of recent date, as hereinafter discussed.

ARGUMENT:

MAY IT PLEASE THE COURT:

I.

THE FIFTH CIRCUIT OPINION IS DIRECTLY CONTRARY TO EXPRESS PROVISIONS OF THE BANKRUPTCY ACT AS INTERPRETED BY THE SUPREME COURT IN THE TIMBER'S CASE AND IN CONFLICT WITH THE RECENT NINTH CIRCUIT OPINION IN THE MATTER OF IN RE: CIMARRON INVESTORS, No. 87-2135 (9th Cir. June 3, 1988) HOLDING TIMBERS RETROACTIVE.

II.

THE FIFTH CIRCUIT ERRED IN LIFTING STAY IN THE MATTER UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

The order of the Bankruptcy Court in this matter ordering the debtor to make periodic payments of principal and interest to PCA is contrary to the express provisions of the Bankruptcy Act as interpreted by the Supreme Court of the United States in the matter of United Sav. Ass'n v. Timbers of Inwood Forest, 108 S. Ct. 626 (1988). Further, the Fifth Circuit's opinion in the matter conflicts with Timbers and, by refusing to apply the same retroactively to the orders in question, with the Ninth Circuit's opinion in the matter of Cimarron Investors v. Wyid Properties, Slip Opinion dated June 7, 1988, Docket No. 87-2135, not as yet published.

It is respectfully submitted that the ordering a debtor to make "adequate protection" payments of princi-

pal and interest to an over-secured creditor clearly conflicts with the Bankruptcy Act. Mr. Justice Scalia in the Timbers case, supra, noted expressly that an over-secured creditor's claim is automatically protected under Section 506 of the Act which the Court cited as follows:

> "Section 506 of the Code defines the amount of the secured creditor's allowed secured claim and the conditions of his receiving postpetition interest. In relevant part it reads as follows:
>
> > "(a) An allowed claim of a creditor secured by a lien on property in which

the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such claim . . . .

"(b) To the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any

reasonable fees, costs, or charges provided for under the agreement under which such claim arose.'"

108 S. Ct. at 630. Further, the Supreme Court expressly discussed the type of situation presented here:

"Even more important for our purposes than Section 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims -- just as it denies over secured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the

collateral. Section 506(b) provides that "[t]o the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim.' (Emphasis added by the Court.) Since this provision permits postpetition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest. See 11 U.S.C. Section 502(b)(2)."

108 S. Ct. at 630-1. With respect to

ordering actual cash payments to a creditor, that Section 361 provides that the court may do so in the event that and "to the extent that the stay under section 362 of this title . . . results in a decrease in the value of such entity's interest in such property," a situation not even suggested in this case. The Supreme Court, in further discussion of the legislative history of the Act further expressly noted that "[i]t is true that Section 506(b) gives the over secured creditor, despite lack of compliance with the conditions of Section 552, a similar priority over unsecured creditors; but that does not compromise the principle of Section 552 since the interest patyments come only out of the 'cushion' in which the oversecured creditor does have a perfected security interest." (Emphasis

added by the Court.). Id. at 632.

Thus, it is obvious that the order of the Bankruptcy Judge ordering periodic payments to begin with was erroneous under Timbers, which should be applied retroactively under the standard of Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971). See In re: Cimarron Investors, Ninth Circuit Slip Opinion, Docket No. 87-2135, dated June 8, 1988. Further, under the Cimarron decision, the debtor is in all probability further entitled to a refund of all monies wrongfully paid to this creditor pursuant to those orders and the matter should remanded to the Bankruptcy Court for such purpose alone. That was the precise holding of Cimarron under procedurally similar facts.

Further, the panel opinion in this matter would further seem to conflict with

the language of the Fifth Circuit's own opinion in the Timbers case on its way to the Supreme Court, cited with approval, in part, by the Supreme Court. In re Timbers of Inwood Forest Associates, Ltd., 808 F. 2d 363 (5th Cir. 1987). The Fifth Circuit, en banc, also rejected the secured creditor's claim for payment of interest during the Chapter 11 proceedings, expressly noting that if the delays to the creditor involved were inordinate, that his remedy was by way of motion to convert or dismiss the proceedings. Judge Clark specifically noted that "[i]n the case of most Chapter 11 debtors, however, a plan of reorganization can be effectuated, if at all, within a matter of months, not years. An occassional Chapter 11 debtor, for example, one with a complex debt structure or multifarious business

problems, may require more time." 808 F. 2d 363, 372. That is precisely the case here where the debtor started out of with a disputed and convoluted debt structure, as outlined above, which the debtor worked diligently to resolve and which the debtor did in fact resolve! The fact is that $1,800,000.00 of mortgages which bore on the property subject of this litigation today no longer bear against it and the morgage debt on the property presently is less than 50% to value. There is obviously a substantial equity cushion from which this clearly oversecured creditor could be paid. It is respectfully submitted, that in the words of the Supreme Court of the United States in the Timbers case - -

> "Petitioner offers no reason why Congress would want to provide relief for such an obstreperous and thoroughly unharmed creditor.

108 S. Ct. 626, 632.

Finally, the Supreme Court indicated that the substance of the inquiry under Section 362 was whether there was effective "reorganization is in prospect." 108 S. Ct. at 632. In this case, that fact is demonstrated by the debtor's efforts to totally eliminate, through its negotiations with one of the creditors, four times the debt that remains involved in this matter. The fact that a reorganization is in prospect is further proven by the plan filed in this matter long before the stay was lifted and the

motion of the debtor to confirm the same which was filed prior to the order subject of this appeal.

CONCLUSION

In short, the orders of the Bankruptcy Court were clearly erroneous as a matter of law. This Fifth Circuit should have determined the issues of law de novo, as pointed out in the Cimmaron matter, supra. The Fifth Circuit opinion is clearly contrary to the language of the Timbers opinion and should be reversed on the Bankruptcy issues alone. Further, this Court should reverse the Fifth Circuit's refusal to apply Timbers retroactively, as did the Ninth Circuit. The orders of the Bankruptcy Court should be set aside and the matter remanded to

the Bankruptcy Court for further consideration in light of Timbers and for hearings on confirmation of the debtor's plan of arrangement.

Respectfully submitted,

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Attorneys For Cambridge Properties, Inc., Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record in this matter by depositing a copy of the same in the United States Mails, postage prepaid and properly addressed, first class.

Covington, Louisiana, this 7th day of December, 1988.

GEOFFREY H. LONGENECKER

88-1004

Supreme Court, U.S.
FILED
DEC 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

NO. _____

IN THE MATTER OF: CAMBRIDGE PROPERTIES, INC.

Debtor

CAMBRIDGE PROPERTIES, INC.,

Petitioner

=versus=

BATON ROUGE PRODUCTION CREDIT ASSOCIATION,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appeal From The United States Court
Of Appeal, Fifth Circuit, No. 88-3133
And From The United States District Court
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(CA-87-4154-E (4)

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TABLE OF CONTENTS OF APPENDIX

Opinion of Court of Appeals,
Fifth Circuit 1

Denial of Rehearing & Rehearing
En Banc of Fifth Circuit 10

Opinion of United States District
Court, Eastern District of Louisiana 12

Opinion and Order of United States
Bankruptcy Court, Eastern District
of Louisiana 23

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3133
Summary Calendar

IN THE MATTER OF: CAMBRIDGE PROPERTIES, INC.

Debtor

CAMBRIDGE PROPERTIES, INC.,

Apellant,

versus

BATON ROUGE PRODUCTION CREDIT ASSOC.,

Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-87-4154-E (4))

(September 26, 1988)

Before CLARK, Chief Judge, Johnson, and JOLLY, Circuit Judges.

PER CURIAM:

Debtor Cambridge Properties, Inc. appeals a decision of the district court affirming an order of the bankruptcy court lifting

an automatic stay imposed pursuant to 11 U.S.C. Section 362. Finding no error in the bankruptcy court's order, we affirm.

I.

In January 1983, Geoffrey and Sara Longenecker executed a collateral mortgage note to creditor Baton Rouge Production Credit Association (Production Credit) in the amount of $500,000. The $500,000 note was secured by an act of collateral mortgage on a certain tract of immovable property in the Parish of St. Tammany, Louisiana. Thereafter, the Longeneckers transferred the St. Tammany property to Cambridge Properties. Subsequent to the above transfer, Cambridge filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on August 19, 1985.

On November 21, 1985, approximately three months after Cambridge instituted proceedings under Chapter 11, Production Credit filed a motion to lift the automatic stay imposed by

virtue of Section 362. After several attempts by Cambridge and Production Credit to negotiate an agreement which would afford adequate protection to Production Credit, as well as several hearings on the matter, the bankruptcy court entered a joint plan of settlement and compromise on July 31, 1986 which included an agreement that Cambridge would furnish adequate protection to Production Credit in the form of monthly cash payments with such payments commencing on or prior to Septmeber 22, 1986. The order of the bankruptcy court further provided that, should Cambridge fail to comply with the conditions of adequate protection set forth in the order, the stay imposed under Section 362 would be automatically lifted upon presentation of an application and order for the lifting of the stay. Importantly, both Cambridge and Production Credit were present at the conference pursuant to which the above adequate protection agreement was entered.

Thereafter, Production Credit received payment from Cambridge on September 26, 1986, but did not receive further payment until May 20, 1987. The payment on May 20th apparently was the result of another conference on May 20, 1987 between the bankruptcy court and the parties wherein Cambridge agreed to continue to make payments to Production Credit on the twentieth day of each month. As a condition of the aforementioned agreement, the bankruptcy court provided that Cambridge's failure to make payment in compliance with the agreement would result in the automatic lifting of the stay without further notice or hearing.

Subsequently, Cambridge once again defaulte on its monthly payments to Production Credit. Accordingly, because of Cambridge's failure to m such payments and bacause of the substantial number of mortgages affecting the property mortgaged to Production Credit, the bankruptcy court lifted the automatic stay on July 31, 1987

Cambridge filed its notice of appeal on August 18, 1987.

II.

Initially, we address Production Credit's contention that we do not possess the requisite jurisdiction to entertain Cambridge's appeal. Bankruptcy Rule 8002(a) provides in pertinent part:

> The notice of appeal shall be filed with the Clerk of the Bankruptcy Court within 10 days of the date of entry of the judgment, order or decree appealed from.

In the instant case, the bankruptcy judge signed the order lifting the automatice stay on July 31, 1987. The record reflects that this order was entered on the docket sheet on August 4, 1987. Cambridge filed its notice of appeal on August 18, 1987. Production Credit contends that, since Cambridge did not file its notice of appeal within the requisite ten day perio- provided in Rule 8002(a), this Court does not possess jurisdiction of the instant cause.

However, the above argument of Production Credit is flawed due to the fact that the appellate timetable for Rule 8002(a) is not triggered until the "entry of the judgment, order or decree appealed from." "Entry" of the order occurs when the order is "set forth in a written document separate from the court's opinion ... and when the substance of this separate document is reflected in an appropriate notation on the docket sheet assigned to the action. . . ." Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683,688 (4th Cir. 1978).

As noted previously, the July 31, 1987 order of the bankruptcy court was entered on the docket sheet on August 4, 1987. Pursuant to Bankruptcy Rule 9006(a), the day that the order appealed from is entered on the docket sheet, as well as intermediate Saturday and Sundays, are not included in computing the ten day periof for purposes of Rule 8002(a). Thus, Cambridge's notice of appeal, filed on August

18, 1987, was timely filed on the tenth day following the entry of the July 31, 987 order of the bankruptcy court; therefore, this Court properly has jurisdiction of the instant appeal.

III.

We next turn to the contention by Cambridge that the bankruptcy court erred in lifting the automatice stay imposed pursuant to Section 362. In reviewing the findings of the bankruptcy judge, this Court shall not set aside those findings unless clearly erroneous. Bankruptcy Rule 8013. In the instant case, the bankruptcy court specifically found that Cambridge had not complied with the terms of the adequate protection agreements Previously fashioned by the parties and the court. Additionally, the bankruptcy court noted that there remained substantial mortgages and encumbrances attached to the property mortgaged to Production Credit.

Section 362(d) provides the following regarding the circumstances under which an

automatice stay may be lifted.

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, anulling, modifying, or conditioning such stay.
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if --
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to any effective reorganization.

While lack of adequate protection is specificall provided for in Section 362 as one type of cause justifying the lifting of any automatice stay, the language of section 362 does not limit "cause" to lack of protection. In Re Family Investments, Inc., 8 B.R. 572 (Bkrtcy. W.D. Ky. 1981). In this regard, we note that "cause" has been interpreted as the failure of a debtor to comply with the terms of an agreed order

affording adequate protection in the form of payments to a creditor. Id.

In the instant matter, Cambridge failed make periodic payments to Production Credit in compliance with the previous orders of the bankruptcy court as agreed upon by the partie Finding especially significant the above in- action by Cambridge, we agree with the distri court's conclusion the the "[o]rder [lifting the stay] was reasonable in lieu of the mortg and encumbrances on the subject property, the length of time which [Cambridge] had been in Chapter 11, and [Cambridge's] failure to comp with the adequate protection agreements which resulted from prior Bankruptcy Court hearings Therefore, we affirm.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-3133

IN THE MATTER OF: CAMBRIDGE PROPERTIES, INC.

Debtor

CAMBRIDGE PROPERTIES, INC.,

Appellant

=versus=

BATON ROUGE PRODUCTION CREDIT ASSOCIATION,

Appellee.

Appeal from the United States District Court
for the Eastern District of Louoisiana

ON PETITION FOR REHEARING AND
SUGGESTION OF REHEARING EN BANC

(Opinion: September 25, 1988, 3 Cir., 1988, ___ F.2d _____)

(November 1, 1988)

Before CLARK, Chief Judge, and JOHNSON and JOLLY Circuit Judges.

PER CURIAM"

The Petition For Rehearing is DENIED and no member of this panel nor Judge in regular service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:
CAMBRIDGE PROPERTIES, INC.
Bankruptcy No. 85-02098K

Debtor

CIVIL ACTION

NO. 87-4154

SECTION: E/4

ORDER AND REASONS

Appellant, Cambridge Properties, Inc., has appealed froman order of the Bankruptcy Court granting Baton Rouge Production Credit Association's motion to lift stay imposed by 11 U.S.C. Section 362. In addition, Appellee, Baton Rouge Production Credit Association, has moved to dismiss Appellant's appeal. The Appellee alleges that Appellant, Cambridge Properties, Inc. failed to file notice of appeal within the requiste ten day period pursuant to Bankruptcy Rule 8002(a). This Court has jurisdiction pursuant to 28 U.S.C. Section 158 and Sectin 1334 and Bankruptcyy Rule 8001.

FACTUAL BACKGROUND

On or about January 13, 1983, Geoffrey and Sara Longenecker executed a collateral mortgage note made to Baton Rouge Production Credit Association (hereinaffter "Secured Creditor") in the amount of $500,000.00. This note was secured by an act of collateral mortgage on immovable property. Thereafter, Geoffrey and Sara Longenecker transferred the ownership of this property to Cambridge Properties, Inc. (hereinafter "Debtor").

On August 19, 1985, Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code. On November 21, 1985, the Secured Creditor filed a motion to lift the automatic stay imposed by 11 U.S.C. Section 362. On July 31, 1986, Bankruptcy Court entered an order lifting

the stay upon presentation of an application and order lifting the stay which set forth violations of the adequate protection agreement.

On or before September 22, 1986, a joint plan of settlement and compromise was entered which included an agreement that $5,000.00 per month, commencing September 22, 1986, would serve as adequate portection for the Secured Creditor. Payment was to commence on September 22, 1986. The Secured Creditor received payment on September 26, 1986 but did not receive further payment until May 20, 1987, when the parties agreed that the Debtor would commence payment and continue to make payments on the 20th day of each month. The Debtor's failure to make payment in compliance with these agreements and the number of outstanding

mortgages Debtor has on this properrty and other properties owned by Cambridge Properties, Inc. resulted in the Bankruptcy Court's order to lift the automatic stay imposed by 11 U.S.C. Section 362 and permitted the institution of foreclosure proceedings on this property by the Secured Creditor.

The Debtor has appealed the order of the Bankruptcy Court. The Secured Creditor has filed a motion to dismiss the debtor's appeal as untimely, for the notice of appeal was not filed within ten days of July 31, 1987 which is the requisite time allowed under Bankruptcy Rule 8002(a).

ANALYSIS

Judge Kingsmill in his order to lift stay found that the debtor had not complied with the terms of either of the

adequate protection agreements. In addition, the Court noted that there remained substantial additional mortgages and encumbrances attached to the property mortgaged by the Secured Creditor. The Bankruptcy Court concluded that automatic stay imposed by section 362 of the Bankruptcy Code be lifted in so far as Baton Rouge Credit Association was concerned.

The standard by which a Bankruptcy Court's Order should be reversed is set out in Bankruptcy Rule 8013 which provides:

> "On appeal tghe district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court judgment, order or decree or remand with instructions for further proceedings.

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Bankruptcy Court to judge the credibility of witnesses."

The Advisory Committe Note concludes that Rule 8013 accords to the findings of a Bankruptcy Judge the same weight given to the findings of a District Judge under Federal Rule of Civil Procedure 52, which states in pertinent part:

> "Findings of fact shall no be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

"It shall be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the Court. Findings of fact and conclusions of law are unnecessry on decisions of motions rule 12 or 56 or any other motion except as provided in Rule 41(b)."

Thereby the standard of "clearly erroneous" must be applied in determining whether the trial court's findings of fact constitute any reversible errors.

Debtor argues that in Wright v. Union Central Life Ins. Co., 311 U.S. 273 (U.S. 1940) the Supreme Court held that so

long as a creditor's rights as to value of his collateral were protected, the creditor was not in a position to insist that doubts and ambiguities in the law be resolved in his favor. In the matter at hand, however, the Bankruptcy court ordered that the creditor's rights as to the value of his collateral were not adequately protected. This issue is factually based. The District Court may only reverse this Order should the Debtor prove that the Bankruptcy Court was "clearly erroneous" in its order. The Debtor has not sustained its burden. The Order given was reasonable in lieu of the mortgages and encumberances on the subject property, the length of time which the Debtor had been in Chapter 11, and the Debtor's failure to comply with the adequate protection agreements which

resulted from prior Bankruptcy Court hearings.

Moreover, Debtor's notice of appeal was not filed within the requisite ten days of the date of the entry of the Order as provided in Bankruptcy Rule 8002(a). In addtion, Debtor did not file a request to extend the time for filing a notice of appeal within the ten day period prescribed by Bankruptcy Rule 8002(c).

Accordingly, IT IS ORDERED that the Bankruptcy Court's order lifting the automatic stay imposed by 11 U.S.C. Section 362 of the Bankruptcy Code in so far as Baton Rouge Production Credit Association be AFFIRMED.

New Orleans, Louisiana, January 12, 1988.

s/Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.

United States District Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:	CASE NO.
CAMBRIDGE PROPERTIES, INC.	85-02098K
DEBTOR	CHAPTER 11

ORDER

This matter having come on for hearing on June 20, 1987 on the motion to lift stay filed by Baton Rouge Production Credit Association.

There were present:

Merrill T. Landwehr, Counsel of Baton Rouge Production Credit Association

Geoffrey H. Longenecker, counsel for Cambridge Properties, Inc.

The Court after hearing the arguments of counsel, ascertained the following from the record in this proceeding:

1. The Motion to Lift Stay was originall filed on November 21, 1985, and, after initial being continued, was heard by this court on February 18, 1986.

2. Thereafter, after additional hearings and Order was entered by this Court on July

31, 1986 providing that the stay imposed unc Section 362 of the Bankruptcy Code shall imm diately be lifted, upon presentation to this Court of an Application and Order for the li ing of such stay, setting forth the violatio or violations of the conditions of adequate protection spelled out in such Order, which included the following:

A. On or before September 22, 1986, Cambridge Properties, Inc. shall negotiate w Baton Rouge Production Credit Association th form of additional adequate protection to be furnished Baton Rouge Production Credit Asso ciation after September 22, 1986;

B. On or before September 22, 1986, Ce Savings & Loan Association and Cambridge Pr perties, Inc. shall either have perfected a dation en paiement or foreclosure of the pr owned by Cambridge Properties, Inc. known a Harbor View Property, which shall result in and all mortgages held by Central Savings & Loan Association being released insofar as property mortgaged to Baton Rouge Productio Credit Association is concerned; and

C. On or before September 22, 1986, Cambridge Properties, Inc. shall deliver to Baton Rouge Production Credit Association sufficient evidence that the only mortgages liens, and encumbrances affecting the prope mortgaged to Baton Rouge Production Credit Association consists of the mortgage in fav

of Baton Rouge Production Credit Association and the mortgage in favor of the Whitney National Bank.

3. On or beofre September 22, 1986, it was agreed that $5,000.00 per month, commencin September 22, 1986, would serve as adequate protection for Baton Rouge Production Credit Association. Since that date a payment in the amount of $5,000.00 was received on September 26, 1986, and no further payments have been made.

4. It was agreed that the $5,000.00 per month monthly payments would be resumed commencing May 20, 1987 and on the 20th day of each month thereafter, failing which the automatic stay would be automatically lifted. Monthly payments were made on May 20, 1987 and June 20, 1987, however, the monthly payment due for July 20, 1987 has not been paid.

5. Additionally, Central Savings & Loan Association and Cambridge Properties, Inc. ha neither perfected a dation en paiement or com

pleted a foreclosure of the property owned by Cambridge Properties, Inc. known as the Harbo View property.

6. Furthermore, there remain substantia additional mortgages and encumbrances affecti the property mortgaged to Baton Rouge Product Credit Association in addition to its mortgag and the mortgage in favor of the Whitney National Bank of New Orleans; therefore, it is

ORDERED that the automatic stay imposed by Section 362 of the Bankruptcy Code insofar as Baton Rouge Production Credit Association concerned, be, and is hereby, lifted so as to permit the institution of foreclosure proceedings against such property by Baton Rouge Production Credit Association.

New Orleans, Louisiana, this 31st day of July, 1987.

T.H. KINGSMILL, JR.
BANKRUPTCY JUDGE